United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7022

B
P/S

JOHN H. MARCHESE,

Plaintiff-Appellant,

-against-

MOORE-McCORMACK LINES, INC.,

Defendant and Third-Party Plaintiff-Appellee,

-against-

COURT CARPENTRY AND MARINE CONTRACTORS CO., INC.,

Third-Party Defendant Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

PLAINTIFF-APPELLANT'S BRIEF

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STATEMENT

Plaintiff-Appellant, John H. Marchese, hereinafter referred to as the plaintiff, appeals from a judgment of the United States District Court for the Eastern District of New York dated and entered on November 7, 1974 (xvi), dismissing the plaintiff's complaint as to the Defendant and Third-Party Plaintiff-Appellee, Moore McCormack Lines, Inc.,

hereinafter referred to as the shipowner, and dismissing the third-party complaints against Court Carpentry and Marine Contractors Co., Inc., Third Party-Defendant-Appellee, hereinafter referred to as Court Carpentry and Universal Terminal and Stevedoring Corp., Third-Party Defendant, hereinafter referred to as the stevedore.

A non-jury trial on liability only was held before Magistrate Vincent A. Catoggio on April 29, 1974 pursuant to a stipulation between the parties (3a) that Magistrate Catoggio should hear and report his findings and conclusions to the Court in accordance with the provisions of Rule 53 of the Federal Rules of Civil Procedure. All parties consented to a dismissal of the third party complaint against Universal Terminal and Stevedoring Corp. (3a-4a). Magistrate Catoggio filed his Master's Report on September 24, 1974 (iii) Plaintiff filed objections to the Master's Report on October 4, 1974.

The shipowner moved, pursuant to Notice dated October 7, 1974, to confirm the Master's Report and plaintiff cross-moved by notice dated October 15, 1974, to accept in part and reject in part the Master's

Report.

Both motions were heard before the Honorable Anthony J. Travia on October 18, 1974. The shipowner's motion to confirm the Master's Report was granted and an order of Judge Travia, dated November 6, 1974, was entered on November 7, 1974, dismissing plaintiff's complaint and the third-party complaints (xiv).

Judgment was entered on November 7, 1974 dismissing the complaint and the third-party complaints (xvi).

Plaintiff filed a timely notice of appeal on November 21, 1974 (xvii).

QUESTIONS PRESENTED ON THIS APPEAL

1. Was the District Court clearly erroneous in its findings that plaintiff's method of performing his work was the sole cause of his injuries?

2. Did the District Court err in its conception of controlling legal principles concerning:

   (a) improper stowage and the resultant unseaworthiness of the vessel?

   (b) contributory negligence and assumption of risk?

3. Was the District Court clearly erroneous in failing to make findings of fact and conclusions of law concerning the negligent failure of the shipowner to discover and correct the improper stowage?

FACTS

On August 17, 1970 plaintiff was employed as a lasher by Court Carpentry and Marine Contractors Co. Inc. (12a) aboard the SS Mormacglen which was moored to the 23rd Street Pier, Brooklyn, New York (12a). The SS Mormacglen was owned and operated by Moore McCormack Lines, Inc.

On the day he was injured, August 17, 1970, plaintiff commenced work aboard the vessel at 8 A.M. (12a). At about 9 A.M., plaintiff was directed by his Assistant Foreman, or snapper, one Mitchell Ellis, to go to #5 hatch, inshore side, and quickly (31a) unlash the deck cargo consisting of pipes (14a) because a longshore gang was standing by at #5 hatch waiting to commence work (16a, 31a, 83a, 89a).

The deck cargo at #5 hatch, inshore side (14a) consisted of four large pipes (17a), which were 4-4 1/2 feet in diameter and 20 feet long (17a, 85-86a).

Three of the pipes rested on wooden timbers (2 x 4's) or sleepers (108a) on the deck (17a) and one rested on the top of two others on the side closest to the hatch coaming, (39a). The pipes were stowed in a fore and aft direction (70a) between the hatch coaming and a solid steel bulwark or rail (68-69a).

The pipes were loaded on the vessel and lashed in Brazil (5a). They were secured with lashing wire (17a) in three places: one lashing on each end and one in the middle (24a, 64-65a), 74-75a). The lashing wires went over the pipes (63-64a) and were secured to padeyes on the deck (69a, 110a) on both the rail side and the coaming side (101a).

At or about 9 A.M. when plaintiff arrived to remove the lashing, there was no wooden bracing or chocks securing these pipes (17a, 24a, 61a). No one notified plaintiff that the pipes were not chocked.

Plaintiff commenced work on the forward end of the pipes, near the bulwark and using a ratchet wrench (32a), he removed the nuts from a clip which held the ends of the lashing wire together. This released the lashing wire. He followed this procedure in the middle of the pipes and then went to the after

end and commenced to loosen the first nut from the clip (28-29a). Before he could proceed further, the pipes shifted and pinned him against the bulwark (18a). He had been working with his back to the bulwark in an 18" space and had not been leaning on the pipes (18a). He did not see if anyone else was unlashing these pipes on the opposite side (19a).

Plaintiff did not look to see if there were chocks under the pipes (24a) and he could not see if the chocks were there without bending down (20a), because of the curve in the pipes.

Plaintiff's co-employee, Alphonse Anderson was also directed by the snapper to go to #5 hatch and quickly (111a) help plaintiff unlash the pipes because the longshoremen were standing by waiting to commence work (83a, 84a, 111-112a).

When Anderson arrived at #5 hatch he went on the coaming side of the pipes (88a) and noticed that at least one lashing had already been removed, so he went to the after end of the pipes (84a), and commenced to remove the clips with his ratchet wrench. He removed one clip and started to loosen the nuts on the second clip when the wire pulled through the clips

and the pipes commenced to roll both ways (85a, 96-97a, 99-100a). He got out of their way. At no time did Anderson see any chocks under the pipes (86a, 107a). He assumed the pipes were chocked because in his experience this type and size pipe always were chocked (98a, 115-116a, 117a).

Plaintiff and Anderson both testified that the method they used to unlash the pipes was an accepted way to unlash when in a hurry (56a, 112a, 133a).

Plaintiff also produced an expert, Nicholas Martino, who testified that he had been a marine carpenter for 24 years and that during this time he also worked as a snapper (124a). Martino described how a crib for pipe is built and how the pipes are chocked, secured and lashed after loading (128-129a).

It was Martino's opinion that pipes such as these could not have been loaded in the position in which they were on August 17, 1970, prior to 9 A.M., unless the pipes were chocked in some manner when they were being loaded and before they were lashed (131a, 135-136a, 139-140a). It was also his opinion that the pipes were not properly secured (138a) and

that the lashing described above was inadequate to properly secure this pipe to go to sea (154a). He would have used 4 stanchions on each side of this pipe, (152a). Martino also claimed that in his experience he had never seen large pipes such as the one involved herein come into New York like this without stanchions (145a).

Martino also concluded that the pipes would never have moved or shifted after the lashing was removed, if they had also been secured with wooden braces or chocks (131a).

No testimony was offered by the shipowner or stevedore.

POINT I

FINDINGS OF FACT NUMBER 21 AND 22 WERE CLEARLY ERRONEOUS AND CONTRARY TO THE UNCONTRADICTED TESTIMONY.

Plaintiff and his co-worker Anderson were the only fact witnesses. Their testimony agreed on how the accident happened. Plaintiff testified that he was directed to go quickly (31a) and unlash the

pipe at #5 hatch. Anderson was subsequently ordered to go and assist plaintiff and do the job quickly (111a). Magistrate Catoggio agreed with this testimony in Finding of Fact #6 (vi). Magistrate Catoggio also agreed that plaintiff did not know that Anderson was working on the other side of the pipes. Finding of Fact #13 (viii).

The sole testimony as to what happened before the pipe rolled was as follows:

Plaintiff testified in answer to questions on cross-examination:

> "Q Now, when you were removing the clip on the third wire, ... what happened then, did you remove the clip? (27a)
> A I started to and that's when the pipe came down." (28a)
>
> * * *
>
> Q Had you removed the first nut before this accident happened?
> A No, I had just gotten it loose; I did not get it off.
> Q So the second one, of course, was not touched at all, is that correct?
> A No.
>
> * * *
>
> Q Now as you started to loosen up this first nut on the third clip, was that when the pipes (28a) started to roll?
> A Yes, that's just when they let go." (29a)

Anderson testified that he went to the last lashing on the pipes and removed one of the two clips holding the lashing. He then removed one of the nuts on the second clip and as he was removing the last nut the pipes moved (85a). On cross-examination (97a) he reiterated:

> "Q Now, when you released this last nut on this clip, is that when the pipes started to move?
> A Yes.
> Q What happened, did the wire pull out of the clip?
> A If I remember correctly, that is exactly what happened.
> Q In other words, this wire did it come out very slowly or did it pull right out?
> A To my memory, it pulled right out, but I really (97a) don't know, because if I stayed there a second later, I might have been crushed.
> Q Did you see it starting to come out?
> A It just happened.
> THE COURT: What started to come out?
> THE WITNESS: Well, from the strain, on the wire that was holding the pipe and by my loosening the last nut, it just came right out.
> THE COURT: You could see the strain that was on the wire, is that correct?
> THE WITNESS: Yes.
> THE COURT: Well, did you expect this to happen?
> THE WITNESS: No, I did not, because usually when piping comes in this way, its chocked, so I assumed it was chocked." (98a)

It thus seems clear, that plaintiff did not release the last lashing; Anderson did and consequently, Finding of Fact #21 (x) is clearly erroneous and contrary to the evidence. This is not a case where the Court had to consider conflicting testimony. In this case, the uncontradicted testimony is that Anderson released the last lashing and any finding to the contrary should be set aside. It is well settled that:

> "In reviewing a judgment of a trial court, sitting without a jury in admiralty, the Court of Appeals may not set aside the judgment below unless it is clearly erroneous", and that "A finding is clearly erroneous when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed' * * *." *McAllister v. United States*, 348 U.S. 19, 20 (1954).

Following the *McAllister* rule, this Court should set aside the findings and judgment herein because there is *no* evidence to support Findings #21 or 22. In *McSwain v. United States*, 422 F.2d 1086 (3 Cir. 1970), the Court held that the clearly erroneous provision of Rule 52(a) of the Federal Rules of Civil Procedure are not applicable where conclusions are not based on any specific evidence in the record.

Finding of Fact #22 (x-xi) is really a combination of alleged facts, legal arguments, legal inferences and legal conclusions which will be dealt with in turn.

The argument as to the unseaworthiness of the vessel will be dealt with later in this brief, but it should be noted here that the Court found that the pipes were not chocked (Finding of Fact #18 (ix)) and the uncontradicted testimony of the expert Martino, was that the pipes were improperly stowed because they were not chocked (138a).

Plaintiff argued at trial and in its post-trial brief that plaintiff could not be found contributory negligent since he was ordered to work in an area which was unsafe and ordered to unlash pipes which were stowed in an unseaworthy manner and consequently he was not contributory negligent as a matter of law. What the Court and defendants refer to as contributory negligence is assumption of risk and not applicable here since plaintiff does not assume the risk of an unsafe place to work.

It was also plaintiff's proof that Anderson did the final act which brought into play the

unseaworthy stowage and that under those facts the vessel would also be liable. These two issues will be discussed at length later.

In addition, the Court erroneously found that plaintiff voluntarily put himself in an unsafe place. Plaintiff testified that he had to work in the space between the bulwark and the pipes in order to reach the lashings (25a-26a). It was also plaintiff's testimony that he did not know the pipes were not chocked, because he couldn't see underneath them (20a). Anderson testified that he assumed the pipes were chocked because this was the way it was usually done (98a). Martino agreed (135-136a, 138a). Consequently, there was no basis for the Court's finding that plaintiff should have known the pipes would roll when he released the lashings. If the pipes had been properly secured, the accident would never had happened.

Since findings of negligence and contributory negligence are subject to more stringent standards because they involve mixed questions of fact and law, then the Court's Finding #22, should be set aside since

there is no evidence to support it and it also involves erroneous legal standards. *Mamiye Bros. v. Barber Steamship Lines, Inc.*, 360 F.2d 774, 776-778 (2 Cir. 1966), cert. denied 385 U.S. 835 (1966); *Falleta v. Costa Armatori*, 476 F.2d 316, 318 (2 Cir. 1973); *Manning v. M/V "Sea Road"*, 417 F.2d 603 (5 Cir. 1969).

POINT II

THE DISTRICT COURT WAS IN ERROR IN ITS CONCEPTION OF CONTROLLING LEGAL PRINCIPALS.

A. The pipes were improperly stowed and the vessel was unseaworthy.

Conclusions of Law #2 stated:

> "2. The ship was not rendered unseaworthy by any condition on her deck or by any act of plaintiff's fellow employees." (xii)

Plaintiff submits that on the basis of the proof and the Court's findings that the pipes were not chocked, the District Court had to ignore the testimony and the law to conclude that the vessel was seaworthy.

As previously pointed out the uncontradicted proof was that the pipes were loaded aboard the vessel

and lashed in Brazil (5a) and that the pipes were not chocked when plaintiff was directed to unlash the pipes and that the usual and accepted way of securing this type of pipe was to build a wooden crib (98a, 135a, 150-152a) or put chocks underneath the pipe (114-115a, 131a, 135-136a) and then lash the pipe with wire lashing (34a, 129a).

The failure of the vessel to have the pipes chocked rendered the vessel unseaworthy, since the duty of furnishing a seaworthy vessel, equipment, appliances and cargo is absolute and non-delegable. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) and is not dependent upon negligence as it is a species of liability without fault. *Le Gate v. Panamolga*, 221 F.2d 689 (2 Cir. 1955).

The shipowner is under a continuing duty to furnish a vessel which is seaworthy in all respects and safe to work aboard. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944); *Seas Shipping Co. v. Sieracki* supra.

Plaintiff need only show that a vessel is unseaworthy in a particular respect and that the particular unseaworthy condition or combination of

conditions was a proximate cause of his injury. *McAllister v. Magnolia Petroleum Company*, 357 U.S. 221 (1958). This he did by showing the absence of chocks and that the absence of chocks allowed the pipes to roll when they were unlashed.

It has long been settled that defective or improperly loaded cargo can render a vessel unseaworthy. See *Scott v. SS. Ciudad De Ibaque*, 426 F.2d 1105, 1106 (5 Cir. 1970), where sacks of coffee bags collapsed on a longshoreman without warning; and *Rich v. Ellerman & Bucknall S.S. Co.*, 278 F.2d 407 (2 Cir. 1960), where an improperly stowed piece of cargo used as a working platform tilted when walked upon.

In fact one of the leading cases involves circumstances very similar to the instant case. In *Palazzolo v. Pan Atlantic S.S. Corp.*, 111 F.Supp. 505, aff'd in part and reversed in part 211 F.2d 277 (2 Cir. 1954), aff'd, *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), plaintiff's claim against the shipowner rested on the fact that large rolls of paper pulp were loaded aboard the vessel without being properly chocked and thus the

vessel was improperly stowed. Thin pieces of dunnage were used in stowing the rolls instead of wedges and in the discharge process, one of the rolls of paper "jumped" the dunnage and struck plaintiff. The case was submitted to the jury on negligence and unseaworthiness and a general verdict was returned. On appeal this Court stated in 211 F.2d at p. 279:

> ". . Since it is reasonably foreseeable that improper stowage must result in rolls of pulp sliding or 'jumping' and striking someone, the ship would be liable for this accident if the jury found, as it did here, that the accident resulted from improper stowage. La Guerra v. Brasileiro, 2 Cir., 124 F.2d 553. Proper stowage is an element of seaworthiness. Pioneer Import Corp. v. The Lafcomo, 2 Cir., 138 F.2d 907. There was ample evidence to support a jury verdict on either or both negligence or unseaworthiness."

If in *Palazzola*, supra, the Court accepted the uncontradicted proof that the rolls were not properly chocked and concluded that the vessel was improperly stowed, it defies logic to claim that the uncontradicted proof in the instant case that the pipes were not chocked should not also result in a finding of unseaworthiness.

Where as here, there is proof that a fellow worker (Anderson) performed an act which brought the unseaworthy condition into play, then *Crumady v. The J. H. Fisser*, 358 U.S. 423 (1959) is applicable and liability can be based on it.

Furthermore, the Court's claim that plaintiff's personal negligent act of unlashing without checking to see if the pipes were chocked, causing his own accident, flies in the face of the Supreme Court's holding in *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971) that unseaworthiness is a condition and whether the condition came into being by negligence or otherwise is irrelevant to the owner's liability for personal injuries resulting from it, 400 U.S. at p. 498.

In our case it is undisputed that the condition (the unchocked pipes) existed when plaintiff arrived at #5 hatch and probably existed for some time prior thereto. This condition rendered the vessel unseaworthy and all Anderson or plaintiff did was bring this condition into play. The Supreme Court in *Usner* reaffirmed the validity of its decision

in *Crumady*, supra when it cited that decision with approval at 400 U.S. 498 in footnote 8.

Consequently, the law applicable hereto is clear and uniformly holds that in similar situations the vessel is rendered unseaworthy by improper stowage and any conclusion of law to the contrary is clearly erroneous.

B. Plaintiff was not contributory negligent.

The undisputed proof is that plaintiff and Anderson were ordered to go to #5 hatch and quickly unlash the pipes (31a, 111a). They both followed the same procedure, which was to use their ratchet wrenches and turn the nuts off clips which held the ends of the lashing wire together (32a, 84a). The reason for the quick action was that a longshore gang was standing by at #5 hatch waiting to commence work.

Plaintiff was ordered to do the job quickly and consequently, he did not check to see if the pipes were chocked. He also assumed that they were chocked since that was the customary way to load and carry pipe.

Because of the fact that plaintiff was

working in a place in which he was ordered to work, and such place was unsafe, he cannot be guilty of contributory negligence. *In Re Luckenbach*, 16 F.2d 168 (SDNY 1925) aff'd, 16 F.2d 171 (2 Cir. 1926); *Salem v. U.S. Lines Co.*, 293 F.2d 121 (2 Cir. 1961) reversed for plaintiff on other grounds, 370 U.S. 31 (1962). In this case what the Court referred to as contributory negligence is in fact assumption of risk, and the Supreme Court has long ago ruled that assumption of risk is not a defense in this type of action. *The Arizona v. Anelich*, 298 U.S. 110 (1936). In fact, the plaintiff does not assume the risk of an unsafe place to work nor working with unseaworthy equipment or cargo, even if it is known to be unsafe by him. *Palermo v. Luckenbach Steamship Co., Inc.*, 355 U.S. 20, modified 355 U.S. 910 (1958).

As stated in *Mahnich v. Southern S.S. Co.*, supra, 321 U.S. at 103 and restated in *Venable v. A/S Det Forenede etc.*, 399 F.2d 347 (4 Cir. 1968) at p. 352: longshoremen are constrained "to accept without critical examination and without protest, working conditions and appliances as commanded by (their) superior officers" ... ... they are "not

deemed to assume the risk of unseaworthiness".

The same reasoning and law applies here. Plaintiff was ordered to work quickly in a place which he did not know was unsafe. He followed orders and acted in the usual manner and was injured because the shipowner had failed his absolute duty to provide a seaworthy vessel. To argue that plaintiff could have done otherwise than he did and thus prevent his accident is to shift to plaintiff the burden of assuming an unsafe and unseaworthy place to work.

The entire subject was discussed in *Ballwanez v. Isthmian Lines, Inc.*, 319 F.2d 457 (4 Cir. 1963) at p. 461-462 as follows:

> "(9) It is the ship owner's absolute and nondelegable duty to furnish to seamen and to others to whom that duty is owing a seaworthy vessel. 'A longshoreman does not assume the risk of negligence or unseaworthiness and this is so whether his action is based on negligence or unseaworthiness.' Klimaszewski vs. Pacific-Atlantic Steamship Co., 246 F2d 875 (3 Cir 1957); Palermo vs. Luckenbach Steamship Co., Inc., 355 U.S. 20, 78 S.Ct. 1, 2 L.ED2d 3 (1957) modified, 355 U.S. 910, 78 S.Ct. 337, 2 L.E.2d 271 (1958)."
>
> "(10-12) The plaintiff was one of a gang of eight longshoremen working in the hold of the defendant's ship. He had no responsibility for, or authority over, any of his fellow workers. His duty was

> to do his work as he was instructed. He was in no sense obligated to protest against the method of operation which he had been instructed to follow or to devise a safer method, nor was he obligated to call for additional or different equipment. *If the doctrine of seaworthiness means anything, it is totally repugnant to the doctrine of assumption of risk on the part of seamen.* The plaintiff in this case was at the very bottom of the hierarchy of command, and the effect of the charge was to place too much responsibility upon him for the over-all operation of the stevedore. The courts have held that where a seaman has a choice between a seaworthy or an unseaworthy part of a ship his use of the latter will not relieve the owner of his responsibility. Palermo vs. Luckenbach Steamship Co., Inc., supra. Certainly if a seaman may deliberately choose an unseaworthy part of a ship without losing his right of recovery then he is under no obligation to complain about his orders or to insist on better equipment. Nor do we think that the error was cured by the Court's later reference to the doctrine of assumption of risk in that part of the charge relating to the issue of plaintiff's contributory negligence." (emphasis added)

The reasoning in *Ballwanez* applies herein. Plaintiff was at the bottom of the hierachy of command, he was instructed to do a particular job quickly and he had no duty to complain about his orders or go seek other equipment to do his job. He also was under no duty to check and see if the pipes were chocked.

The Second Circuit Court of Appeals has recently ruled on this subject and severely limited what can be called contributory negligence. In *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255 (2 Cir. 1973), a seaman slipped and fell on a wet and sloppy floor, which condition he knew about. The jury was allowed to consider whether plaintiff was contributory negligence because he continued to work after becoming aware of the dangerous condition of the floors. The Court of Appeals held in 474 F.2d at 257-258 that this was improper because the trial court allowed assumption of risk to go to the jury under the guise of contributory negligence.

Surely if the plaintiff in *Rivera* was not contributory negligent for working in an area which he knew was dangerous, then plaintiff, in this action cannot be charged with contributory negligence on the basis of a danger of which he had no knowledge or no reason to believe existed.

The Court's Conclusion of Law #1 (xii) should be set aside as being clearly erroneous and contrary to the proof and the law.

POINT III

THE DISTRICT COURT ERRED IN FAILING TO MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE NEGLIGENCE OF THE VESSEL.

The proof was that the pipes were loaded and lashed on the vessel in Brazil (5a) and that the expert Martino testified that the pipes had to be chocked in some manner while being loaded and before being lashed (131a, 135-136a, 139-140a). Consequently, since it is undisputed that the pipes were not chocked when plaintiff arrived to unlash them, then the only fair inference from this testimony is that the chocks were removed or fell-out sometime prior to plaintiff's arrival at #5 hatch and that this condition was known to the vessel's officers or should have been known to them. In either event, the officers were negligent in not informing plaintiff of this potentially dangerous condition and allowing him to work in a dangerous area.

A shipowner is under a duty to exercise reasonable care for the safety of longshoremen and lashers discharging its vessel and to provide the

longshoremen or lashers with safe equipment and appliances and a safe place in which to work. *Mahnich v. Southern SS Co.*, supra. A shipowner is liable for the negligent acts of its officers, agents, servants or employees performed during the course of their employment aboard the vessel. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

In a similar situation, the vessel was deemed at fault in *Palazzolo v. Pan Atlantic S.S. Corp.*, supra, wherein the Trial Court reviewed the proof and stated at 111 F.Supp p. 507:

> "However, the hatch boss and three longshoremen in plaintiff's gang testified that there were no wedges used in the hold at all, and that merely 'scrap' dunnage, which one of the longshoremen described as 'firewood', was employed to stow the heavy rolls of paper. In view of this testimony, it is plain that Pan-Atlantic's cargo officer did not properly perform his admitted duty to supervise the safe and careful loading of the vessel. It cannot be said, as urged by Pan-Atlantic, that the absence of wedges was a latent or hidden defect which the cargo mate could not reasonably have been expected to discover. The testimony of the longshoremen as to the generally dangerous manner in which the cargo was stowed without wedges leads to no other conclusion but that the cargo officer in the exercise of reasonable care should have discovered and corrected the condition."

Following the reasoning of *Palazollo*, the Court should have considered the issue of negligence and found the vessel at fault for failing to warn plaintiff of an unsafe condition which they knew or should have known about. The case should be remanded for a proper finding on this issue.

CONCLUSION

THE FINDINGS AND CONCLUSIONS OF LAW OF THE DISTRICT COURT AS OUTLINED WERE CLEARLY ERRONEOUS AND CONTRARY TO THE PROOF AND THE LAW AND THE JUDGMENT SHOULD BE REVERSED AND THIS CASE REMANDED FOR PROPER FINDINGS AND CONCLUSIONS OF LAW.

Respectfully submitted,

IRVING B. BUSHLOW
Attorney for Plaintiff-
Appellant

SERVICE OF 2 COPIES OF THE WITHIN

Brief

IS HEREBY ADMITTED.

DATED: 2/14/75

Daugherty, Ryan, Mahoney, Pellegrino, Giuffra

Robert M. Pellegrino

Attorney for 3rd party Pl Moran McCormack

SERVICE OF 2 COPIES OF THE WITHIN

Brief

IS HEREBY ADMITTED.

DATED: 2/14/75

(s) Herbert Lasky

Attorney for 3rd party defendant Court Carpentry and Marine Contracting Co. Inc.